Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1978

No. 78-1361

HAROLD D. McCOY,
Petitioner

vs.

BOARD OF DIRECTORS OF LINCOLN INTERMEDIATE UNIT NO. 12,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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Opinion Below

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. ———

HAROLD D. McCOY,

Petitioner,

v.

BOARD OF DIRECTORS OF LINCOLN INTERMEDIATE UNIT NO. 12,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioner, Harold D. McCoy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania entered in this proceeding on September 28, 1978.

OPINIONS BELOW

The opinion of the Commonwealth Court of Pennsylvania, reported at Pa. Commonwealth Ct. , 391 A.2d 1119 (1978), appears in the appendix hereto.

Opinions Below

The opinion of the Acting Secretary of Education, reported in Teacher Tenure Opinions, Volume VI, July 1976 to November 1977, at page 98, also appears in the appendix.

Jurisdiction and Questions Presented

JURISDICTION

The judgment of the Commonwealth Court of Pennsylvania was entered on September 28, 1978. A timely *petition for allowance of appeal* was filed with the Supreme Court of Pennsylvania and was denied on December 13, 1978. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1976).

QUESTIONS PRESENTED

1. Was the bias of Respondent Board of School Directors which demoted Petitioner so great as to deny him due process of law, when prior to the hearings held before it, which hearings were required by state statute, the Board had already approved a resolution to demote Petitioner upon the conclusion of the hearings?

2. Was the Commonwealth Court's use of "the maintenance of an efficient and competent school system" as the standard upon which to uphold Petitioner's demotion an unwarranted extension of *Arnette v. Kennedy,* 416 U.S. 134 (1974), and violative of his right to due process of law, when the demotion was carried out pursuant to a state statute that provided no specific causes for demotion and that cannot be read to imply any of the reasons offered by Respondent to support the demotion?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. XIV, Section (1):

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended:

Section 11-1122 (24 Pa. Stat. Ann. §11-1122):

> The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth.

Section 11-1151 (24 Pa. Stat. Ann. §11-1151):

> The salary of any district superintendent, assistant district superintendent or other professional employe in any school district may be increased at any time during the term for which the board of school directors of the district deems it necessary or advisable to do so, but there shall be no demotion of any professional employe either in salary or in type of position, except as otherwise provided in this act, without the consent of the employe, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employe.

STATEMENT OF THE CASE

Petitioner, Harold D. McCoy, was employed by Respondent, Board of School Directors of Lincoln Intermediate Unit No. 12, as Director of Special Education. In this capacity he managed a budget of over $5,000,000 and supervised a professional and support staff of approximately 400 persons.

On March 25, 1975, without prior warning to Petitioner, the Executive Director of Lincoln Intermediate Unit submitted a statement of charges to the Board of Directors recommending Petitioner's demotion to the position of School Psychologist. Petitioner was accused of: (1) Disloyalty to "the" Administration and the Lincoln Intermediate Unit; (2) insubordination; (3) disruption of staff and personnel; and (4) incompetence in administration.

The Board considered these charges on April 1, 1975 and, by a vote of 11-1, adopted a resolution *demoting* Petitioner to School Psychologist.

According to state law, a demotion cannot become effective until after a hearing, and so the resolution provided that the effective date of the demotion would be May 7, 1975. By letter dated April 3, 1975, Petitioner was notified of the Board's action and of his right to a hearing. By letter dated April 8, 1975 counsel for Petitioner notified the Board that a public hearing was requested. Subsequently, the Board met 26 times, taking testimony, hearing legal argument, deciding the case, and supplementing the original four charges with 37 specific allegations: nine

under disloyalty, twenty under insubordination, one under disruption, and seven under incompetence.

On August 5, 1975 the Board reaffirmed its resolution of April 1, 1975 and voted 10-2 to demote Petitioner. By letter dated August 11, 1975 notice of the demotion, effective August 5, 1975, was sent to Petitioner.

Mr. McCoy appealed the Board's action and on October 8, 1975 a hearing was held before a Hearing Examiner appointed by the Acting Secretary of Education. The Acting Secretary's opinion of February 2, 1977 sustained the Board's action holding that statutory procedural requirements had been satisfied, that there was no denial of Petitioner's constitutional right to due process, and that the charges against Petitioner were supported by substantial evidence. On February 25, 1977 Petitioner filed a petition for review in the Commonwealth Court of Pennsylvania.

The Commonwealth Court affirmed the opinion of the Acting Secretary of Education in an order entered September 28, 1978. Petitioner then filed a timely *petition for allowance of appeal* with the Supreme Court of Pennsylvania which petition was denied in a *per curiam* order entered December 13, 1978.

HOW FEDERAL QUESTIONS ARE PRESENTED

The federal questions raised in this petition for certiorari are whether Petitioner was denied due process of law because of the lack of an articulable standard on which to base his demotion and because of the existence of excessive bias of the Respondent Board of School Directors which approved his demotion.

These two issues were first raised in the pleadings of Petitioner's appeal to the Acting Secretary of Education of the Commonwealth of Pennsylvania. Paragraph 14 stated: "[t]he general charges . . . violate the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution since they provide an impermissibly vague definition of demotable conduct." After fully discussing this issue the Acting Secretary's opinion states "it follows that [petitioner's] claim of vagueness must fail." (Appendix p. 55) In paragraph 18 Petitioner claimed "The Board failed to render a fair and impartial decision for the reason that the Board decided before the hearings were held that it had sufficient evidence to support its action and it thereby took action to demote [petitioner] McCoy effective May 7, 1975." The Secretary responded: "[t]he record does not reflect that the Board acted blindly or unfairly, nor that it was bound by an arbitrary prejudgment." (Appendix p. 63)

Petitioner continued to raise these issues in his *petition for review* submitted to the Commonwealth Court. Paragraph 3(i) essentially restated paragraph 18 of the

pleading before the Acting Secretary. Paragraph 3(o) (1, 6) restated paragraph 14 of the earlier pleading. The Commonwealth Court reiterated the opinion of the Acting Secretary as follows: "[W]e cannot accept the argument that there is an unconstitutionally vague standard being applied in this case." (Appendix 26); "we believe that [petitioner] has not met his burden of proving that the Board here was not an impartial tribunal or that it was bound by an arbitrary prejudgment." (Appendix p. 30).

A discretionary *petition for allowance of appeal* to the Supreme Court of Pennsylvania was denied without opinion. Thus, the highest court in which a decision could be had, the Commonwealth Court of Pennsylvania, expressly considered and rejected both contentions raised here by Petitioner.

REASONS FOR GRANTING THE WRIT

I. Petitioner Was Denied Due Process of Law Because the Board Which Demoted Him Was Excessively Biased Against Him

One of the basic precepts of due process of law is that anyone presenting himself before a tribunal is entitled to a fair and impartial decision. Although the procedures mandated by due process may change with the setting of the case, Petitioner submits that in no case can such a decision be rendered if the decision maker has voiced its opinion of the merits of the particular case before it prior to hearing the evidence. In the present case, Respondent Board of School Directors first voted to demote Petitioner and then proceeded to hear the evidence against him. If this decision is permitted to stand, any hearing could be transformed into a *pro forma* exercise in advocacy merely by deciding the matter before learning the facts.

No reported decisions of this Court or of the Courts of Appeals squarely present this issue, and rightly so, for it strains credulity to think that any supposedly impartial body would bother to offer anyone a hearing *after* his fate has been determined and then have the temerity to defend its action in court. Nevertheless, that is the exact situation presented in this case. This denial of due process of law is so blatant that it becomes important for this Court to grant this petition solely to prevent this "method of justice" from spreading any further than the confines of this lawsuit.

Pennsylvania law provides that no professional employee of a school district shall be demoted without his consent prior to a hearing before the board of school directors. The Public School Code of 1949, as amended, provides as follows:

> "There shall be no demotion of any professional employe . . . , except as otherwise provided in this act, without the consent of the employe, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors." 24 Pa. Stat. Ann. §11-1151 (1978).

So far as Petitioner McCoy is concerned, this statutory requirement of a hearing is mere surplusage. Due process demanded that he be given a hearing in any event since he had an expectation of continuing employment which established a property right from which grew substantive and procedural due process rights under *Perry v. Sinderman,* 408 U.S. 593 (1972).

Petitioner's claim of bias must overcome a strong presumption in favor of the board's impartiality. Decisions in this area have been concerned with whether a combination of investigatory and adjudicatory functions in the same body denies due process to the "accused." Petitioner submits that this case is distinguishable from those cases which have delimited the bounds of administrative bias. If certiorari is granted, this Court will have the opportunity to clarify exactly when an administrative body has violated its constitutional duty to render an impartial decision.

The leading decision on administrative bias is *Withrow v. Larkin,* 421 U.S. 35 (1975), in which this Court reaffirmed its prior decisions that combining both investigatory and adjudicatory power in one board is not *per se* a

denial of due process. If the present action involved a school board which determined that probable cause existed to demote Petitioner and then held an impartial hearing before making a final decision, *Withrow* would control. The facts here, however, are so substantially dissimilar to those in *Withrow* and other adjudicative bias decisions, that they present a novel issue ripe for decision by this Court.

In *Withrow* the board held an investigatory hearing to determine whether there was probable cause to suspend Dr. Larkin's license to practice medicine. It then notified him that it would hold a "contested hearing" to determine whether his license would be temporarily suspended. The district court enjoined this hearing because it would violate Dr. Larkin's right to due process of law if the board made a decision based upon charges derived from its own investigation. No evidence was presented to indicate that the impartiality of the board was actually compromised by this procedure. This Court reversed and stated: "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." (421 U.S. at 55.)

The contrast between *Withrow* and the present case is striking. Petitioner McCoy's demotion was first suggested to the Board at its regular April meeting by the Executive Director of Lincoln Intermediate Unit No. 12. Petitioner had no notice that the Board would consider his status at that meeting. Therefore, he was not present and had no opportunity to present any defense to the charges proffered by the Executive Director. The Board, rather than merely noting the existence of probable cause, voted *at that same meeting* to demote Petitioner effective May 7. Upon receiving notice of this *ex parte* decision, Petitioner demanded the hearing to which he was entitled by Pennsylvania law. (24 Pa. Stat. Ann. §11-1151 (1978).) Despite its irremediable bias evidenced by the vote *prior* to the hearing, Respondent proceeded to conduct a hearing, but this futile act failed to provide Petitioner with the minimum requirement of due process—"a fair trial in a fair tribunal." *In re Murchison,* 349 U.S. 133, 136 (1955).

The proper resolution of this case is suggested by *Morrissey v. Brewer,* 408 U.S. 471 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). Those decisions "held that when review of an initial decision is mandated, the decision-maker must be other than the one who made the decision under review." *Withrow v. Larkin,* 421 U.S. at 58, n. 25. Respondent's review of its own initial decision was constitutionally invalid and served to deprive Petitioner of the fair tribunal to which he was entitled. Petitioner recognizes that the facts of *Morrissey* and *Gagnon* are different than those presented here but submits that the principle of those cases, as enunciated in *Withrow,* should be extended to encompass administrative determinations as well as parole and probation revocations.

One of the important reasons for this Court's decision in *Withrow* and other administrative bias cases is the burden of requiring every administrative body to separate its investigative and adjudicatory functions. That factor is not present here. The extra burden imposed on a board by a decision here for Petitioner would simply be to forbear from deciding the issues before the hearing. Certainly, such forbearance is the minimum to be expected from any tribunal.

If this Court should hold for Petitioner only on this issue the proper relief would be to remand the case to the Secretary of Education with orders to conduct a *de novo* hearing and make findings of fact and conclusions of law. A remand to the Board would not alleviate the problem. The Secretary of Education has the ability and experience to dispose of this case in a just and efficient manner.

II. Petitioner Was Denied Due Process of Law Because He Was Demoted Without an Articulable Standard on Which To Base the Demotion

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Although the constitutional significance of this case transcends parochial concerns, a proper analysis of the issues must begin with an examination of Pennsylvania law. Petitioner McCoy was demoted pursuant to section 1151 of the Public School Code of 1949, as amended, which reads as follows:

> [T]here shall be no demotion of any professional employe either in salary or in type of position without the consent of the employe, or if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of dismissal of a professional employe.

In its review of the demotion hearing given Mr. McCoy, the Commonwealth Court interpreted this section in light of *Smith v. School District of the Township of Darby,*

388 Pa. 301, 130 A.2d 661 (1957), to require that only the procedural aspects of a dismissal hearing be applied to a demotion proceeding. Mr. McCoy was thus not demoted "in the same manner as hereinbefore provided in the case of dismissal" because the grounds of demotion are not those specified in section 1122. Section 1122 provides that the grounds for dismissal are as follows: immorality; incompetency; intemperance; cruelty; persistent negligence; mental derangement; and persistent and wilful violation of the school laws. Petitioner was charged with disloyalty, insubordination, disruption of staff and personnel, and incompetence in administration. Since neither section 1151 nor section 1122 provides that a professional employe may be demoted for these reasons, the Commonwealth Court looked to case law construing the statute in an effort to uphold the demotion.

The standard applied by the court, "the maintenance of an efficient and competent school system," (Commonwealth Court opinion p. 25) was first articulated by the Supreme Court of Pennsylvania in *Smith v. School District of the Township of Darby, supra.* The Commonwealth Court, however, failed to appreciate the boundaries placed on this expansive interpretation by the *Smith* court:

> The power of creation and abolition of departments, positions and offices must rest with the school authorities. The only limitation which should be imposed on the exercise of this power should be that the board must act intelligently, impartially and with sound discretion ever mindful of the high principles enunciated in the Constitution and the Public School Code concerning our educational system. . . . *Smith, supra,* at 314, 130 A.2d at 669.

The Commonwealth Court gave little consideration to Petitioner's argument that the statute, as applied to him, was void for vagueness. In *Arnette v. Kennedy,* 416 U.S. 134 (1974), this Court held that "the efficiency of the service" was a sufficiently precise standard upon which to uphold a dismissal. The Commonwealth Court used the *Arnette* decision as a crutch to support its decision upholding the validity of the Pennsylvania statute. The present decision, however, is an unwarranted extension of *Arnette.* Consequently, when this crutch is removed, the decision must fall because it lacks any foundation whatsoever.

This Court should grant certiorari to delineate the extent to which the *Arnette* rationale may be utilized in differing contexts. In *Arnette* the criterion for dismissal ("the efficiency of the service") was set forth in the Civil Service Act, 5 U.S.C. §7501 (a). "Congress sought to lay down an admittedly general standard . . . in order to give myriad different federal employees a common standard of job protection." 416 U.S. at 159. In the present case the Pennsylvania legislature was not faced with so difficult a task. Its ability to set standards for a discrete group, professional school employees, is clearly displayed in section 1122 of the Public School Code, 24 Pa. Stat. Ann. §11-1122, which sets forth the seven exclusive grounds for dismissal. A statute directed toward a closely defined group of employees should provide the greatest possible specificity. When there are no standards of conduct specified, judicial review becomes meaningless. See *Bence v. Brier,* 501 F.2d 1185 (7th Cir. 1974), *cert. denied* 419 U.S. 1121.

A further distinction between *Arnette* and the present case and one that directly challenges the constitutionality of the statute is that an arguably vague standard such as

"the maintenance of an efficient and competent school system" can be considered constitutionally sufficient only when applied to objective criteria such as fiscal or administrative efficiency. Extending its application to subjective matters such as insubordination and disloyalty so attenuates its meaning as to permit arbitrary and capricious decision making. As far as Mr. McCoy and other educators are concerned, this extension should be subject to careful scrutiny because "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker,* 364 U.S. 479, 487 (1960).

Until the present case, all Pennsylvania courts following *Smith* have applied this standard only to demotions for fiscal or administrative efficiency. Petitioner does not question here the power of a school board to realign its personnel because of a lack of funds, decrease in enrollment, or even a change in overall educational policy. But to permit Mr. McCoy to be deprived of his expectation of continued employment pursuant to a "standard" that allows any demotion whatsoever, denies him due process of law. Neither Mr. McCoy nor any other educator subject to this amorphous standard has "a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws trap the innocent by not providing fair warning. . . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them" *Crayned v. Rockford,* 408 U.S. 104, 109 (1972).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania.

Respectfully submitted,

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Dated: March 1, 1979

APPENDIX

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 441 C.D. 1977

HAROLD D. McCOY,
Petitioner

v.

LINCOLN INTERMEDIATE UNIT NO. 12,
Respondent

BEFORE:

Honorable James C. Crumlish, Jr., Judge
Honorable Genevieve Blatt, Judge
Honorable Richard DiSalle, Judge
Argued: June 5, 1978

OPINION

Opinion by Judge Blatt, filed: September 28, 1978:

Harold D. McCoy (appellant) appeals here from an order of the Acting Secretary of Education (Secretary) which dismissed his appeal from his demotion by the Board of Directors (Board) of the Lincoln Intermediate Unit No. 12 (L.I.U.).

The appellant was employed by the L.I.U. as Director of Special Education. In February of 1975, a then newly appointed Executive Director, Dr. Irvin A. Karam, held a meeting with the appellant to discuss his alleged deficiencies and "lack of accountability", and his resignation was then requested, with Dr. Karam assuring him of reassignment as a School Psychologist with no reduction in pay. Several days later the appellant wrote to Dr. Karam that he would resign only if the Board could legally demonstrate sufficient cause for his removing himself as Director of Special Education. On March 25, 1975, Dr. Karam submitted a Statement of Charges to the Board recommending the appellant's demotion to the position of School Psychologist, accusing him of (1) disloyalty to the Administration, (2) insubordination, (3) disruption of staff and personnel, and (4) incompetence as an administrator. On April 1, 1975, the Board adopted a resolution demoting the appellant from Director of Special Education to School Psychologist effective May 7, 1975. The appellant was notified by a letter dated April 3, 1975, of the action taken and of his right to a hearing under the Public School Code of 1949.[1] He requested such hearing and the Board met twenty-six times in the course of conducting the hearing. Meanwhile, the effective date of the appellant's demotion had been continued until June 30, the first expected date of the conclusion of the hearing, and then again until August 5, 1975. During the hearing the four original allegations were supplemented by thirty-seven additional charges, and, on August 5, 1975 the Board sustained all four original allegations and thirty-three of the supplementary charges and

[1] Act of March 19, 1949, P.L. 30, *as amended*, 24 P.S. §1-101 et seq.

demoted the appellant to the position of School Psychologist. He then appealed to the Secretary of Education and, following a hearing, the Acting Secretary entered an order sustaining the Board's action and dismissing the appeal. This adjudication is now before us on appeal.

This Court's scope of review in appeals from the Secretary of Education is to determine whether or not an error of law was committed, constitutional rights were violated, or necessary findings of fact are unsupported by substantial evidence. *Steffen v. Board of Directors*, 32 Pa. Commonwealth Ct. 187, 377 A.2d 1381 (1977); *Bovino v. Board of School Directors*, 32 Pa. Commonwealth Ct. 105, 377 A.2d 1284 (1977).

The appellant maintains here that he was not demoted on any valid basis but simply because his supervisor did not like him. He argues that his demotion should be set aside because he was denied substantive due process under the Public School Code of 1949 (Code), and under the fourteenth amendment of the United States Constitution.

The Board argues initially that the appellant had no property interest in his position nor any right to a hearing or to any of the other established procedures for effecting demotions under the Code because he had no written contract of employment. It cites two cases in which we have held that public school teachers' contracts must be in writing to be valid and enforceable. *Department of Education v. Jersey Shore Area School District*, 23 Pa. Commonwealth Ct. 624, 353 A.2d 91 (1976) and *Gordon v. Board of Directors*, 21 Pa. Commonwealth Ct. 616, 347 A.2d 347 (1975). We do not believe, however, that these cases are determinative of the professional employee status of this appellant, for they were decided under Section 1121 of the

Code, which, although it specifically requires contracts of professional employees of *school districts* to be in writing,[2] does not apply to employees of an *intermediate unit*.[3] *Commonwealth ex rel. Waychoff v. Tekavec,* 456 Pa. 521, 319 A.2d 1 (1974).

We note, however, that Section 913A of the Code, 24 P.S. §9-963(e), provides that all professional employees of an intermediate unit shall have the same rights of tenure as similar employees of a school district. There is no definition of "professional employee" in this Section concerning intermediate unit employees, but there is a definition provided in Section 1101 of the Code, which sets forth the procedures for demotion of professional employees, and we believe that this definition in Section 1101 would apply here. It provides that a "professional employee" shall refer to those employees who are certified as, among others, "supervisors" and "school counselors". 24 P.S. §11-1101(1). The regulations of the State Board of Education, of course, provide that the Department of Education has the responsibility for "designation of professional titles for personnel", 22 Pa. Code §49.13(b)(2),[4] and, pursuant to this authority, the Department has designated the titles for positions which would fall within the category of "supervisor" so as to include "Supervisor of Special Education".[5] Policies, Procedures and Standards for Certification of Professional School Personnel, Pennsylvania Department of Education (1970). We believe, therefore, that the appellant, as Director of Special Education was a "Supervisor", and that he was, therefore, a "professional employee" entitled to the protections afforded by the Code. And, among those protections, is his right not to be demoted in an arbitrary or discriminatory manner. Indeed, any failure on the part of a board to comply strictly with the procedures set forth in the Code will render an attempted demotion abortive. *Tassone v. Redstone Township School District,* 408 Pa. 290, 183 A.2d 536 (1962); *Smith v. Darby School District,* 388 Pa. 301, 130 A.2d 661 (1957); *Abington School Board v. Pittenger,* 9 Pa. Commonwealth Ct. 62, 305 A.2d 382 (1973); *Bilotta v. Secretary of Education,* 8 Pa. Commonwealth Ct. 631, 304 A.2d 190 (1973).

The appellant, relying on his rights as a professional employee, points to Section 1151 of the Code arguing that it fails to set forth any standards of conduct upon which a demotion can be based and is therefore constitutionally void for vagueness.[6] This section reads in pertinent part as follows:

[2] Section 1121 of the Code, applicable in those cases, provides;

"In all school districts, all contracts with professional employes shall be in writing. . . ." 24 P.S. §11-1121.

[3] Intermediate units are comprised of numerous school districts. *See* Section 901-A and 902-A of the Code, added by Section 1 of the Act of May 4, 1970, P.L. 311, 24 P.S. §9-951 and §9-952.

[4] Section 2(h) of the Act of August 13, 1963, P.L. 689, 24 P.S. §1225(h), amending the Act of May 29, 1931, P.L. 210, authorizes the Department of Education to prescribe the professional titles used in the public school system.

[5] Similarly, a "School Psychologist" falls within the category of "school counselor" which is a "professional employee" under Section 1101(1), 24 P.S. §11-1101(1). *Charleroi Area School District v. Secretary of Education,* 18 Pa. Commonwealth Ct. 121, 347 A.2d 736 (1975).

[6] We believe the appellant can attack the statute as void for vagueness while alternatively claiming the right to the procedural protections provided within the same statute because the Code contains a severability section, Section 104, 24 P.S. §1-104. Furthermore, we note that one who obtains benefits under a statute is

> "[T]here shall be no demotion of any professional employee either in salary or in type of position without the consent of the employee, or if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of dismissal of a professional employee."

Our Supreme Court has recognized, in *Smith v. Darby School District, supra,* 388 Pa. at 308, 130 A.2d at 666, that "[t]he statute provides 'why' and 'how' an employee may be dismissed but only 'how' an employee may be demoted." And it held there that the demotion in question, resulting there from the abolition of a position, was valid as within the general power of school boards to maintain an efficient and competent school system. The Court said:

> "The determination that such action was necessary, if arrived at after a consideration of the educational needs of the school district rather than on any arbitrary or improper basis, was within the power of the school board. . . ." 388 Pa. at 315, 130 A.2d at 669.

The Court also added, citing *Regan v. Stoddard,* 361 Pa. 469, 65 A.2d 240 (1949) wherein it approved the following language of the lower court:

> " ' "We must reiterate that a court is not a super Board of directors with superior knowledge of the administration of business, finance, or the science of pedagogics. It would be presumptuous to superimpose judicial control upon the exercise of discretion by trained educators. The legislature has vested wide powers in the Board of school directors. . . . Our appellate courts repeatedly have affirmed their exercise of this discretion." ' " 388 Pa. at 315, 130 A.2d at 669.

The maintenance of an efficient and competent school system has clearly been accepted as a valid reason for the demotion of an employee, and we will accept it here. We would note further that dismissal for "such cause as will promote the efficiency of the force" has been upheld as not unconstitutionally vague and as not a deprivation of due process by our United States Supreme Court in *Arnett v. Kennedy,* 416 U.S. 153 (1974). A legislative enactment will be deemed invalid only if it is so vague and indefinite that courts are unable to determine with any reasonable degree of certainty the intent of the legislative body or so incomplete, conflicting and inconsistent in its provisions that it cannot be executed. Furthermore, we believe that the appellant here was well aware of the basis for his demotion. He was informed numerous times by his super-

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not always estopped from attacking the statute as being unconstitutional. *See Schenley Distillers, Inc. v. United States,* 153 F. Supp. 898 (E.D. Pa. 1957) aff'd, 255 F.2d 334 (3d Cir. 1958); *New York Life Ins. Co. v. Armenian-American Building & Loan Ass'n.,* 17 F. Supp. 694 (E.D. Pa. 1937); *Sexton v. Stine,* 456 Pa. 301, 319 A.2d 666 (1974); *Philadelphia, Morton & Swarthmore Street Railway Company's Petition,* 203 Pa. 354, 53 A. 191 (1902); *Borough of Towanda v. Swingle,* 90 Pa. Superior Ct. 82 (1927). *But see Arnett v. Kennedy,* 416 U.S. 134 (1974) wherein Justice Rhenquist notes inconsistencies of application.

We do note that the provisions of the Code listing valid causes for termination of the same professional employees as immorality, incompetency, intemperance and cruelty, have been held not to be unconstitutionally vague or indefinite. *Bovino v. Board of School Directors,* 32 Pa. Commonwealth Ct. 105, 377 A.2d 1284 (1977). *See Albert Appeal,* 372 Pa. 13, 92 A.2d 663 (1952).

visor that his insubordinate, disruptive and disloyal conduct was in question, and clearly a professional employee whose failure to abide by legitimate instructions or to accept the authority of his or her supervisor may subject him to *dismissal,* is certainly subject to the lesser penalty of demotion. *See Spano v. School District,* 12 Pa. Commonwealth Ct. 170, 316 A.2d 162 (1974). We cannot conclude that a person of ordinary intelligence was not capable of determining what conduct was proscribed and could therefore subject him to demotion proceedings, so we cannot accept the argument that there is an unconstitutionally vague standard being applied in this case.

The appellant argues further that he was denied procedural and substantive due process in his demotion because (1) he was not afforded reasonable notice that his conduct was unsatisfactory and constituted grounds for demotion; (2) the charges against him were continuously supplemented during the course of the demotion hearing; (3) the Executive Director, Dr. Karam, was unqualified to evaluate his work; (4) he was denied a fair and impartial hearing; (5) the charges were not sustained by substantial evidence that would lead an impartial tribunal to conclude that they had been proved. The law is clear that the action of a board in a case such as this is presumptively valid. *Hibbs v. Arensberg,* 276 Pa. 24, 119 A. 727 (1923); *Lucostic v. Brownsville Area School District,* 6 Pa. Commonwealth Ct. 587, 297 A.2d 516 (1972). And the appellant, as the demoted employee contesting the action of the Board, has the burden of proving the action to have been arbitrary, discriminatory, or founded upon improper considerations. *Smith v. Darby School District, supra; Lucostic v. Brownsville Area School District, supra; Lakeland Joint School District v. Gilvary,* 3 Pa. Commonwealth Ct. 415, 283 A.2d 500 (1971). We must agree here with the Acting Secretary that the record clearly indicates that the appellant was afforded notice of his unsatisfactory performance. It plainly shows that he had five meetings with the Executive Director over a one-year period during which an evaluation of his unsatisfactory performance was made. And, as stated by the Acting Secretary, these meetings culminated in a lengthy discussion in February of 1975 during which the Executive Director informed the appellant that he was recommending his reassignment to the position of School Psychologist and discussed with him fifteen to twenty areas of concern, many of which are reflected in the record as having also been discussed with the appellant prior to that meeting. Furthermore, the appellant was provided with a statement of the charges against him and given ample notice of his opportunity for a hearing.

The appellant complains that at least twenty-nine allegations of misconduct, in addition to those covered in the first thirty-seven charges which in turn supplemented the original four basic complaints, were entered in the hearing record at various times during the course of the hearings without any prior notice to him. Our review of the record reveals, however, that these were not new and additional charges, but amplifications of the four basic charges (disloyalty, insubordination, disruption of staff and incompetent administration) and that they arose out of testimony given at the hearing and during the cross-examination of the appellant. Furthermore, inasmuch as the decision of the Board was based upon a vote solely regarding the statement of charges submitted to the appellant prior to the

hearing, we believe that the appellant's argument as to lack of notice relative to these particular allegations is without merit.

The appellant also argues that the Executive Director had little or no knowledge of the administrative and psychological concepts necessary for administering and evaluating special education programs, and that his evaluation of the appellant's performance was therefore invalid. In support of this contention, he cites numerous statements by the Executive Director at the hearing indicating that he might arguably have been adhering to invalid criteria.[7] Although the Executive Director was the person who evaluated and submitted the statement of charges against the appellant, he was not the adjudicator. The Board made the final determination, and it met a total of twenty-six times, hearing testimony from the Executive Director, the appellant, and numerous witnesses and considering legal arguments advanced by each party. The appellant had ample opportunity to establish the Executive Director's lack of credibility at the hearing if he could have done so, but it was the Board, of course, which considered and voted on the charges. As has been stated previously, the courts are not a superboard with superior knowledge of the administration of public schools or the science of pedagogics, and we will not disturb the findings of the Board merely because of a charge that they are based upon an allegedly unqualified evaluation witness. *See Smith v. Darby School District, supra.*

[7] For example, when asked to define the basis for his evaluation of the appellant's allegedly improper attitude, the Executive Director responded "It's like falling in love, you just know." (N.T. 392)

In support of the appellant's allegation that he was denied a fair and impartial hearing, he points out that when the Board met on April 1, 1975 it did not merely vote to notify the appellant that the statement of charges submitted could result in his demotion and that he had a right to a hearing, but also adopted a resolution demoting the appellant effective May 7, 1975. The law is clear that a demotion cannot become effective until after the hearing has taken place. *Tassone v. Redstone Township School District,* supra; *Abington School District v. Pittenger, supra.* This Court in *Abington* relied upon the language of our Supreme Court in *Tassone* where it stated:

> "The prime function of any hearing procedure is to require the official authority to explain its action to the professional employee affected and to afford him the opportunity to present his position in light of such explanation.
>
> ". . . .
>
> "The demotion moreover cannot become effective until *after* the hearing has taken place." 408 Pa. at 293-94, 183 A.2d at 538-39.

The notice here read in part as follows:

> "[T]his Board has sufficient evidence to support its action and therefore said Harold D. McCoy is hereby demoted from Director of Special Education to School Psychologist as of May 7, 1975."

The Board argues that the procedure which it observed scrupulously followed the procedure approved in *Abington, supra,* because the Board made the effective date of this demotion several weeks later, not wanting to render a final decision until the hearing had concluded. In support

of this argument, the Board points out that it referred in its action to the "pending demotion" and, after the hearings began, it continued the effective date of the demotion twice, once to June 30 and again to August 5, 1975. This Court said in *Abington, supra*:

> "The Board only needed to have passed a resolution that it had sufficient evidence to support its belief, to demote [the appellant] Albrecht by some given date, and therein direct the Secretary and President of the Board to serve notice upon Albrecht of this fact and to advise him of his right to a hearing." 9 Pa. Commonwealth Ct. at 71, 305 A.2d at 387.

The Board points out in addition that the final vote on the appellant's demotion was not unanimous on all charges and so reflected the independence of the Board and the lack of a consistent voting among the Board members. There is, of course, a presumption of honesty and integrity on the part of those serving as adjudicators, and we believe that the appellant has not met his burden of proving that the Board here was not an impartial tribunal or that it was bound by an arbitrary prejudgment.

The appellant argues, finally, that the charges were not sustained by substantial evidence and that the testimony in the record demonstrates that his performance was highly satisfactory. Our review of the record indicates, however, that testimony was received on all of the charges and that all were supported by substantial evidence. As noted in the opinion of the Acting Secretary, quoted in the Board's brief:

> "It is not unusual for a highly competent professional technician or clinician to be advanced to a supervisory position where he finds himself unsuited for his new role. . . . Therefore, it is no reflection upon Mr. McCoy's professional competence as a psychologist that the Board has determined that he was performing unsatisfactorily in the supervisory position of Director of Special Education. In fact, the Board's decision to retain him as a school psychologist is an endorsement of his competence as a school psychologist."

We believe that there is substantial evidence on the record to support the Board's decision to demote the appellant and that this action was taken as a reasonable exercise of the Board's discretion free from any violations of due process.

The order of the Acting Secretary sustaining the Board's action and dismissing the appeal is therefore affirmed.

(s) Genevieve Blatt
Genevieve Blatt, *Judge*

ORDER

AND NOW, this 28th day of September, 1978 the order of the Acting Secretary of Education in the above-captioned matter is hereby affirmed.

(s) Genevieve Blatt
Genevieve Blatt, *Judge*

IN THE OFFICE OF THE SECRETARY OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA, AT HARRISBURG, PENNSYLVANIA

No. 273

Appeal of Harold D. McCoy, a Professional Employee, from a decision of the Board of School Directors of the Lincoln Intermediate Unit No. 12, New Oxford, Pennsylvania

OPINION

Robert N. Hendershot
Acting Secretary of Education

Harold D. McCoy, Appellant herein, has appealed from the decision of the Board of School Directors of Lincoln Intermediate Unit #12 demoting him from the position of Director of Special Education to School Psychologist.

FINDINGS OF FACT

1. The Appellant, Harold D. McCoy, is a professional employee. From 1954 to 1957 he was employed as a classroom teacher in the Clarion-Limestone Consolidated Schools teaching special education students; from 1957 to 1960 as a principal and Director of Special Education and Training at the Laurelton State Village, a school and hospital for the mentally retarded; from 1960 to 1961 as the Supervisor of Special Classes for Bradford and Sullivan

Counties; from 1961 to 1971 as Supervisor of Special Education, Franklin County; from July 1, 1971 to June 30, 1974 as Assistant Executive Director in Charge of Special Education in Lincoln Intermediate No. 12. On July 1, 1974, Appellant's title was changed to Director of Special Education for the Lincoln Intermediate Unit No. 12.

2. Appellant is certified to teach English, social studies and special education, and is certified as a Psychological Examiner of the emotionally disturbed, Public School Psychologist, Superintendent, and subsequent to the filing of the charges, Supervisor of Special Education.

3. At the time of the filing of charges, the Office of the Director of Special Education of Lincoln Intermediate Unit No. 12 was responsible for the supervision of three hundred employees (two hundred professional and one hundred non-professional) in a program that encompassed six thousand children in twenty-five school districts.

4. In February, 1974, Dr. Irvin A. Karam, Appellee herein on behalf of the Board, was appointed to the position of Executive Director of the Lincoln Intermediate Unit.

5. During the ensuing twelve months, until March 25, 1975, the record discloses a rapid deterioration in the working relationship between the Executive Director and Appellant. This period was characterized by numerous occasions when the Executive Director indicated to Appellant that his performance was unsatisfactory in one particular area or another. In addition, the record indicates five meetings—in April, August, and October, 1974 and in January and February of 1975—during which the Executive Director engaged in serious discussions with Appellant and evaluated Appellant's progress.

6. In April, 1974, during an informal meeting, the Executive Director discussed with Appellant the need to utilize the staff efficiently and to develop procedures and policies in order to avoid repeated mistakes and makeshift solutions.

7. In August, 1974, the Executive Director and Appellant discussed the in-service program for returning teachers, at which time the Executive Director expressed dissatisfaction with Appellant's unfamiliarity with his staff's preparatory work.

8. In early October, 1974, the Executive Director discussed with Appellant a number of unsatisfactory items, including the policies that had been followed for recruitment and hiring. The record discloses the Executive Director's growing concern with Appellant's evasiveness and unaccountability.

9. On January 23, 1975, the Executive Director and Appellant discussed, among other subjects, the former's concerns relating to staff performance appraisal and the working relationships among Appellant's staff and the need for improved communications between Appellant and the Executive Director.

10. In late January, 1975, the Executive Director began to accumulate and organize material to express his concerns over Appellant's performance. The Executive Director postponed a meeting until after the Board concluded its investigation into the resignation of two key staff members from the Department of Special Education.

11. On February 13, 1975, in a meeting lasting over two hours, the Executive Director discussed at length with Appellant approximately fifteen to twenty specific deficiencies in the latter's performance as Director of Special Education. The chief concern expressed by the Executive Director was Appellant's lack of accountability. The Executive Director requested that Appellant submit a resignation and assured Appellant of a reassignment to school psychologist at no reduction in salary. At this time Appellant was reminded of his right to due process.

12. Appellant thereupon contacted legal counsel and from that time has had continuous legal representation.

13. On Monday, February 17, 1975, the Executive Director received a letter from Appellant dated the previous day, which stated in part:

> "Allow me to respond by saying that I will comply with your request and accept the position of School Psychologist if the Board requests the change in position and if the Board can demonstrate legally that there is sufficient cause for me not to remain in my present position."

14. On March 4, 1975, the Board, each member having received a copy of Appellant's letter, was informed by the Executive Director that he would recommend Appellant's reassignment from Director of Special Education to School Psychologist with no reduction in salary.

15. On March 25, 1975, a nine page Statement of Charges was distributed to the Board. In the Preamble to the Charges, two basic requirements of "training" and "experience" are set forth for the position of Director of Special Education, followed by five additional general requirements of an occupant of that position:

> "1. possess a significant amount of organization ability.

2. have the willingness and ability to work with people and be able to earn their respect; to in turn be able to kindle a desire in the hearts and minds of his colleagues to work with him.

3. have the skill to recognize problems where they exist and the leadership ability to bring about their resolution in a positive working climate.

4. be one who is devoid of bias or provincialism and responsiveness to the needs of all areas of the Intermediate Unit.

5. be willing to accept authority and be accountable to it."

16. The Statement of Charges covers nine typewritten, single-spaced pages. The detailed charges and the testimony elaborating them can be found in the record. The charges encompass four general areas: "Disloyalty to Administration and the Lincoln Intermediate Unit," "Insubordination," "Disruption of Staff and Personnel," and "Incompetence in Administration."

Under the four headings a total of thirty-seven specific charges were brought: nine under Disloyalty; twenty under Insubordination; one under Disruption; and seven under Incompetence.

17. The Charges, summarized in part, are the following:

I. Disloyalty to Administration

That Appellant refused to communicate adequately with the Executive Director and directed his staff to do likewise, thereby insulating the Executive Director from the Special Education staff;

—willfully failed accurately and adequately to convey information from the Executive Director to the administrative staff on matters of importance to the Special Education program;

—attempted to undermine the authority of the Executive Director and the working effectiveness of his subordinates.

II. Insubordination

That Appellant made staffing changes and decisions against the express instructions of the Executive Director and without his knowledge or approval;

—willfully failed to initiate efforts to recruit a replacement for a particular opening;

—created positions which are nonexistent in the certification guidelines for which no prior approval had been secured;

—willfully and persistently failed to keep the Executive Director informed about the details of planning and Unit involvement in a major Special Education project;

—refuse to cooperate in the recruitment of school psychologists;

—failed to investigate and dispel the Unit superintendent's fears of regional bias in the planning and implementation of programs.

III. Disruption of Staff and Personnel

That Appellant has little desire or ability to develop a positive working climate;

—has discouraged use of a team management concept;

—has told certain staff members to avoid each other.

IV. Incompetence in Administration

That Appellant's inactivity has forced the Executive Director to assume direction in the development of effective hiring procedures, requisitioning and purchasing procedures, and the Special Education budget for 1975-76;

—would not provide the Business Manager with the necessary assistance in fulfilling his job requirements;

—lacks the skill to successfully complete an Administrative and Supervisory Table of Organization Plan.

The Executive Director concluded the Statement of Charges with the following:

"The Special Education program is still growing and shortly it is expected that the rulings of the Courts and/or the State Board of Education will result in the mandated expansion of services encompassing the complete spectrum of the handicaps or exceptionalties.

The Executive Director is of the opinion that Mr. Harold D. McCoy is incapable of coming to grips with the multitude of problems and challenges that are certain to come, as those which already exist.

It is not with any pleasure that the Executive Director recommends to the Board of the Lincoln Intermediate Unit that Harold D. McCoy be demoted to the position of Psychologist, effective May 7, 1975, within the provisions of Section 1127 of the Public School Code of 1949."

18. On April 1, 1975, the Lincoln Intermediate Unit Board of Directors adopted a resolution by a vote of 11 to 1 demoting Appellant from Director of Special Education to School Psychologist, effective May 7, 1975.

19. By registered mail dated April 3, 1975, Appellant was notified of the Board's action, and in accordance with Section 1127 of the School Code was given notice of his right to a hearing, open or closed to be held April 16, 1975 at a specified location and to conclude at a later date if necessary.

20. By letter dated April 8, 1975, counsel for Appellant notified the Board that an open hearing was requested.

21. On May 6, 1975, some three weeks after the hearing had commenced, the Board voted a delay of the effective date of the proposed demotion until June 30, 1975, the expected date of the conclusion of the hearing and the Board's final determination. On June 30, the effective date of the proposed demotion was continued until August 5, 1975.

22. Between April 26, 1975 and August 5, 1975, the Board met twenty-six times, hearing testimony from the Executive Director, Appellant, witnesses for each party, legal argument, and deciding the case, in the process compiling an official stenographic report of 3,543 pages.

23. On August 5, 1975, each of the thirty-seven individual charges was voted upon, with all but four sustained by varying votes. Each of the four general charges was voted upon with the Board sustaining the general charge of Disloyalty by a vote of ten to two, Insubordination by ten to two, Disruption of Staff by nine to three, and Incompetence in Administration by ten to two. The Board

concluded its public hearing by voting ten to two to sustain Appellant's demotion.

24. By letter dated August 11, 1975, notice of the demotion was sent to Appellant.

25. On September 9, 1975, Appellant's petition of appeal was received in the Office of the Secretary of Education. On October 8, 1975, a hearing on appeal was held.

DISCUSSION

Appellant assails the legitimacy of his demotion on two general grounds: statutorily, under Section 1151 of the Public School Code 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. Section 11-1151 (hereinafter referred to as the School Code) ; and constitutionally, under the Due Process Clause of the fourteenth amendment to the United States Constitution.

First, Appellant asserts a property interest in his position as Director of Special Education entitling him to due process of law under the United States Constitution. In addition, he claims a denial of notice in that Section 1151 of the School Code is unconstitutionally vague. More specifically, he asserts a denial of notice in the instant case in that the Board did not promulgate standards of demotable conduct nor provide Appellant reasonable notice that his conduct was prohibited; in that the general charges brought against him are inpermissibly vague; in that the requirements for Director of Special Education stated in the Preamble to the Charges are not contained in the job description; in that the charges were continuously supplemented during the course of the demotion hearing; and in that Appellant was never given an unsatisfactory rating prior to the filing of charges. Appellant also asserts that the Executive

Director lacked valid criteria for evaluation, that the four general grounds for his demotion are not valid causes for termination or demotion under Section 1122 of the School Code; that the Board unfairly prejudged Appellant; and finally, that the charges were not proven by a preponderance of the evidence.

Because of the seriousness and complexity of the allegations in this case, this Office has engaged in an exhaustive review of the entire record, including the 3,543 pages of testimony taken before the Board of Directors of the Lincoln Intermediate Unit, the testimony before the Hearing Examiner, and the lengthy briefs submitted by each side. It is the Secretary's conclusion that the procedural requirements of the School Code for the demotion of a professional employee have been satisfied, that Appellant has suffered no denial of his constitutional right to due process, and that the charges against him are supported by substantial evidence. Accordingly, we must dismiss the appeal and uphold the Board's action demoting Appellant to school psychologist.

The arguments that Appellant advances amount to a general challenge on constitutional grounds to the demotion procedure set forth in the School Code and followed in this case. The challenge is based upon a claim of denial of procedural due process. Due process is not a static concept: "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. It is not a technical concept unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961). Further, under the Constitution procedural due process is required only to the extent that any action taken by the Board affects interests of a

constitutional dimension, i.e., life, liberty, or property. Otherwise, no particular procedure need be followed. *Board of Regents v. Roth,* 408 U.S. 564, 569 (1972). If Appellant's demotion did not deprive him of any constitutionally protected interest of property or liberty, then he was not entitled to procedural due process under the Constitution and this appeal must fall. *Jeffries v. Turkey Run Consolidated School District,* 492 F.2d 1 (1974). Even assuming, as we do not, that Appellant's constitutional interests were infringed, it is the opinion of the Secretary that Appellant's rights were safeguarded throughout the proceedings.

The two theories available to Appellant concerning deprivation of an interest protected by due process are first, that he had a property interest in his position as Director of Special Education and, second, that the charges brought against him so stigmatized his professional reputation, and thus his marketability, that it represents a deprivation of "liberty". See *Board of Regents v. Roth,* supra, and *Perry v. Sinderman,* 408 U.S. 593 (1972).

First, we must consider whether Appellant had a property interest protected by the Constitution. Appellant was a professional employee. Absent a valid cause for dismissal, the right to continued employment is vested in professional employees. It is clearly a property right, the deprivation of which demands procedural and substantive due process. *Perry v. Sinderman,* supra. The substantive right to continued employment is no more than that. The provisions of the School Code do not interfere with the general power of a school board to assign professional employees to particular classes or schools or positions in accordance with its judgment and discretion reasonably exercised. A professional employee acquires no vested right in any one particular position. *Appeal of Santee,* 307 Pa. 601, 156 A.2d 830 (1959); *Wesenberg Case,* 346 Pa. 438, 31 A.2d 151 (1943); *Commonwealth ex rel. Wesenberg v. Bethlehem School District,* 148 Pa. Super. 250, 24 A.2d 673 (1942). The only limitations on a school board's right to demote from one professional position to another are that a proper procedure be followed, including an explanation of the reasons for demotion, and that the work to which the professional is assigned be of a rank or class equivalent to that by which his permanent status was acquired and for which he is qualified. *Smith v. Darby School District,* 388 Pa. 301, 130 A.2d 661 (1947). This clearly fits Appellant's case.

Since there is no constitutional right to government employment, *Board of Regents v. Roth,* supra, the only property interest Appellant enjoyed was the right to protection from termination without cause under Section 1122 of the School Code as well as the procedural protection outlined for demotions under Section 1151. The Section provides in relevant part:

> ". . . [T]here shall be no demotion of any professional employee either in salary or in type of position without the consent of the employee, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of a dismissal of a professional employee." 24 P.S. Section 11-1151

Procedural protection under Section 1151 is the only protection afforded Appellant against demotion to a lower professional status.

> "Any professional employee may be demoted under the statute provided that such demotion takes place only after a hearing, that such demotion not be made in an arbitrary or discriminatory manner . . . , and that the reasons for such demotion must be made clear and apparent." *Smith v. Darby,* supra at 319.

No property interest cognizable under the Constitution is created by the School Code's requirement that a professional employee be given notice, hearing, and a right of appeal. See *Shirck v. Thomas,* 486 F.2d 691 (7th Cir. 1973). Since Appellant enjoyed no entitlement to any one particular position, he has suffered no deprivation of a constitutionally protected property interest. And since Appellant's rights were protected throughout in any event, he has not been denied due process.

As stated above, the second theory available to Appellant under the Due Process Clause is that he has suffered a deprivation of liberty. Under this theory, if the charges of Disloyalty, Insubordination, Disruption, and Incompetence and the resulting demotion are so serious as to stigmatize Appellant's professional reputation, thereby impairing his freedom to pursue his profession through other job opportunities, then procedural due process under the United States Constitution must be provided. *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957).

Whether or not the stated reasons for demotion in Appellant's case would effect a deprivation of liberty is conjectural. Certainly, the charges are not of the same magnitude as "immorality," "dishonesty," "communism, subversive activities, alcoholism, or narcotics violations", all of which have been held to be serious threats to one's liberty. See *Adams v. Walker,* 492 F.2d 1003 (7th Cir. 1974) and *Board of Regents v. Roth, supra.* Even where liberty is deprived, action may be taken before a hearing with no denial of due process as long as a hearing is held subsequently. *Arnett v. Kennedy,* 416 U.S. 134 (1974).

> "Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." Id. at 157.

In Appellant's case, regardless of his assertion that the charges against him are stigmatizing, he has been afforded procedural due process through a lengthy hearing *preceding* his demotion, during which he had ample opportunity to clear his name.

Where the legislature creates substantive rights for employment of government employees, the legislature may also prescribe methods for the withdrawal of such rights so long as such methods provide the employee notice of the charges, a hearing before any deprivation of a property right, and an opportunity to save his reputation from stigmatizing charges. *Arnett v. Kennedy,* supra. The legislature of this Commonwealth did not intend, nor does due process require, that the demotion of Appellant upon clear and valid grounds should ultimately suffer procedural paralysis. Due process merely forbids the arbitrary infringement by state action of a constitutionally protected interest until a hearing is held on the merits. *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Goldberg v. Kelly,* 397 U.S. 270 (1970). An examination of the record in this case leads us to conclude that the procedure followed in Appel-

lant's demotion satisfied both the School Code and constitutional requirements by providing Appellant ample notice by a detailed statement of charges, an opportunity to confront, cross-examine, and rebut the proponents of this action, and a thorough hearing on the merits prior to the deprivation of an alleged constitutionally protected interest of liberty or property.

In addition to his allegation of a property interest requiring constitutional protection, Appellant raises numerous issues attacking the constitutionality of the Public School Code. This Office will not uphold a constitutional challenge to the School Code. The scope of review for an appeal directed to the Secretary of Education is defined by Section 1131 of the Public School Code, which provides in relevant part:

> "The [Secretary of Education] shall review the official transcript of the record of the hearing before the board, and may hear and consider such additional testimony as he may deem advisable to enable him to make a proper order. At said hearing the litigants shall have the right to be heard in person or by counsel or both.
>
> After hearing and argument and reviewing all the testimony filed or taken before him, the [Secretary of Education] shall enter such order, either affirming or reversing the action of the board of school directors, as to him appears just and proper." 24 P.S. Section 11-1131.

In his review of a board's action concerning a professional employee, the Secretary of Education has had no statutory authority conferred upon him to consider the con-

stitutionality of the School Code. The Secretary has taken the position that it would be presumptuous, as well as counter-productive to attack the constitutionality of the very statute which grants him the authority of his office.

> "The consideration of the constitutionality of acts of assembly is a function for the courts. The law does not give the Secretary of Education any authority to adjudge an act of assembly unconstitutional, and in the absence of any court decision on the point, it is our judgment that the presumption of constitutionality pertains." *Commonwealth v. Yerkes,* 285 Pa. 39 cited in *Appeal of Watson,* Supt. of Public Instruction Opinion No. 77 (1951); see also *Appeal of Albert,* Supt. of Public Instruction Opinion No. 78 (1951).

Appellant asserts that Section 1151 of the Public School Code, under which he was demoted, is void for vagueness in that it fails to set forth any standard of conduct upon which a demotion can be based. The first issue which this Office must address is Appellant's standing to attack the School Code for vagueness.

First, we agree that a person may not be punished for violating a standard of behavior which is so unclear that reasonably intelligent men cannot act so as to avoid violating the imprecise standard. However, Appellant cites many cases which are inapplicable since they involve criminal statutes with penal sanctions. The demotion resolution passed by the Board of the Lincoln Intermediate Unit does not constitute "punishment" and was not intended to do so. Appellant has suffered no loss in salary, nor has he lost his position as a professional employee. Appellee's brief provides appropriate analysis:

> His loss, if any, is certainly an intangible one. It is true that his duties will be different, and that he will not have supervisory authority. This is a change in duties, and to the extent that he has been moved out of the upper echelons of the administrative chain of command, it is a demotion. Certainly the Board's action may have undesired consequences for Mr. McCoy in terms of his professional advancement. But these are the risks of aspiring to supervisory administrative and policymaking roles as opposed to continuing to engage in the "pure" practice of one's profession. It is not unusual for a highly competent professional technician or clinician to be advanced to a supervisory position where he finds himself unsuited for his new role. . . . Therefore, it is no reflection upon Mr. McCoy's professional competence as a psychologist that the Board has determined that he was performing unsatisfactorily in the supervisory position of Director of Special Education. In fact, the Board's decision to retain him as school psychologist is an endorsement of his competence as a psychologist. Appellee's Brief at 25-6.

Second, Appellant participated in "hardcore" demotable conduct and therefore cannot raise the vagueness issue. "Hardcore conduct" is conduct so obviously violative of standards of propriety that a reasonable man should have known that he was engaging in conduct that would place his position in jeopardy. *Herzbrun v. Milwaukee Co.*, 504 F.2d 1189 (7th Cir. 1974); *Michini v. Rizzo*, 379 F. Supp. 837 (E.D. Pa. 1974). A person who engages in "hardcore" misconduct has no standing to challenge a statute on vagueness grounds since as to his conduct it is not vague,

Herzbrun v. Milwaukee Co., supra. This principle is particularly applicable where, as in Appellant's case, there is no claim that a vague standard infringes upon the exercise of first amendment rights. *Herzbrun*, supra.

While it is clear that Appellant did not participate in demonstrations involving physical obstruction or interference with others as in *Herzbrun* and other cases, it is equally clear that Appellant, as Director of Special Education of an intermediate unit, should have known that he had to conform to serious professional standards in meeting substantial responsibilities. The detailed Statement of Charges and the record below indicates that Appellant's behavior was not confined to a few isolated incidents of unaccountability but to a series of incidents and relationships with his staff and immediate superior, which grew to interfere seriously with the administration of the Unit's most important program, Special Education.

A professional employee should be aware that his employment is subject to the legitimate instructions and authority of his supervisor. The standard for demotable conduct was sufficiently clear so that the intentional and repeated acts, found by the Board to constitute disruption, disloyalty, insubordination, and incompetence should have been anticipated by the Appellant to constitute unacceptable conduct. The actions determined by the board to have been conducted by Appellant would violate any standard of acceptable professional behavior, whether or not they were delineated with pinpoint specificity. "Hardcore" misconduct in the professional realm, when it is committed over an extended period, is no less serious for its lack of suddenness. Something less than the blatant violations found in *Herzbrun v. Milwaukee Co.*, supra or *Meehan v.*

Macy, 392 F.2d 822 (D.C. Cir. 1968), modified 425 F.2d 472 (D.C. Cir. 1969), can still constitute hardcore misconduct, which precludes Appellant's standing to attack the School Code for vagueness.

Third, while claiming the protection of the tenure provisions of the School Code, 24 P.S. Sections 1121 to 1132, Appellant assails the same statute for its constitutional vagueness. In *Arnett v. Kennedy*, supra, a public employee dismissal case, Justice Rehnquist writes:

> " 'The court has previously viewed skeptically the action of a litigant in challenging the constitutionality of portions of a statute under which it has simultaneously claimed benefits.' Fahey v. Mallonee, 332 U.S. 245 (1947). 'It is an elementary rule of constitutional law that one may not retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' U.S. v. San Francisco, 310 U.S. 16 (1940). Arnett v. Kennedy, supra at 153."

Appellant seeks the procedural safeguards of Section 1151 of the School Code while attacking its failure to state with particularity the causes for which he may be demoted. "Where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant must take the bitter with the sweet." *Arnett v. Kennedy*, supra at 154.

While Appellant has questionable standing to challenge the constitutionality of the School Code, the Code itself is not unconstitutionally vague as applied to Appellant. There is a strong presumption of constitutionality of statutes, *Williams v. Samuels*, 332 Pa. 265, 273, 2 A.2d 834 (1938), and the longer a statute is in effect, the strong-

er the presumption of constitutionality. *Harrison's Estate*, 250 Pa. 129, 95 A. 406 (1915).

"The root of the vagueness doctrine is a rough idea of fairness." *Arnett v. Kennedy*, supra at 159, quoting *Colton v. Kentucky*, 407 U.S. 104 (1971). The School Code achieves substantial fairness in alerting professional employees to the fact that certain conduct can result in a demotion while at the same time granting school boards maximum flexibility to assess the performance of their employees.

Appellant argues that because the boundaries of his administrative responsibilities and conduct were occasionally indistinct, "well articulated standards of performance are required in order not to necessarily inhibit the functioning of a professional employee at the executive level." Appellee's brief at 11. Our conclusion is that the legislature envisioned that in varying administrative settings, where responsible professionals engage in a wide range of administrative functions including supervision of staff, development of new programs, and communication with subordinates and superiors, such potentially inhibiting universal standards should not be promulgated.

A review of the School Code and case law suggests that standards of demotable conduct may be found in the case law construing the School Code and in the language of the Code itself. Even where the bare language of a statute might be uncertain, limiting constructions of that language by courts may cure any vagueness. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). Pennsylvania appellate courts have over the years construed the language of the Code's tenure provisions. *The Teachers' Tenure Act Cases*, 329 Pa. 213, 197 A. 344 (1938) discusses the mean-

ing of "merit" and "good behavior". In Pennsylvania Supreme Court cases we find definitions of minimum standards for professional employees to qualify as "competent", "capable", and "adequate". *Welsko v. Foster Twp. Sch. Dist.*, 383 Pa. 390, 392, 119 A.2d 43, 44 (1956); *Walker's Appeal*, 332 Pa. 488, 491, 2 A.2d 770, 772 (1938). These cases stress that teachers' tenure provisions do not guarantee ironclad job security despite disruption or insubordination, but that they foster the fundamental policy of providing for the education and welfare of children. *Johnson v. United Sch. Dist. Jt. Sch. Bd.*, 201 Pa. Super. 375 (1963).

The language of the School Code itself suggests standards of demotable conduct. Section 1121, which describes the contract entered into by professional employees such as Appellant, states in relevant part:

> ". . . [T]he professional employee shall, under the authority of the said board . . . and subject to the supervision and authority of the properly authorized superintendent of schools or supervising principal, serve. . . ." 24 P.S. Section 11-1121.

Section 1121 expresses general standards to be observed by professionals. It clearly implies that acts of insubordination, disruption, and disloyalty contradict the letter and spirit of the standards of professional conduct incorporated in the professional employee contract. Regardless whether Appellant in his position as Director of Special Education was covered by such a contract, the statutory language serves as a guideline for standards of demotable conduct.

The legislature did not intend that executive directors of school boards be powerless to take reasonable measures to insure that policy and instructions be followed, even if

in the process demotion or dismissal of personnel became necessary. "The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). *Smith v. Darby Sch. Dist.*, supra, has stood for twenty years as a judicial linchpin for the concept that:

> "School authorities must be given broad discretionary powers to ensure a better education for the children of this Commonwealth and any restrictions on the exercise of these powers must be strictly construed . . . Id. at 314. We must reiterate that a court is not a super board of directors with superior knowledge of the administration of business, finance, or the science of pedagogics. It would be presumptuous to superimpose judicial control upon the exercise of discretion by trained educators. The legislature has vested wide powers in the Board of school directors. . . . Our appellate courts repeatedly have affirmed their exercise of this discretion. Day v. Amwell Township School District, 283 Pa. 248; Hibbs v. Arensberg, 276 Pa. 24; Lamb v. Redding, 234 Pa. 481. In the latter case, judicial interference was confined to those cases where it was 'apparent that it is not discretion that is being exercised but arbitrary will or caprice.'" Smith v. Darby, supra at 315 quoting Regan v. Stoddard, 361 Pa. 469, 65 A.2d 240 (1949).

The legislature, in adopting the tenure provisions which were later incorporated into the Public School Code of 1949, imposed a graduated set of restrictions on the discretionary authority of school boards over dismissal and demotion of professional employees. Dismissal, a drastic and

severe action, was sharply limited with procedural safeguards of notice, hearing and appeal (24 P.S. Section 11-1127) as well as a list of specific causes for termination. (24 P.S. Section 11-1122).

The authority of school boards to demote professional employees was also limited but, logically, less so since its sanctions were less severe than dismissal. While the same procedural safeguards as in the case of dismissal were imposed on a demotion proceeding, the School Code places no express restrictions on what constitutes demotable conduct: "The statute provides 'why' and 'how' an employee may be dismissed but only 'how' an employee may be demoted." *Smith v. Darby,* supra at 308. The legislature never intended to limit cause for demotion to a few specific grounds. A reservoir of relatively broad, discretionary authority was preserved for the school board to determine sufficient cause for demotion. It would place too great a burden on the legislature to demand that it specify every conceivable act that could result in a demotion.

"The right of a school board to make reasonable rules and regulations, reassign teachers, and take *other steps necessary* for a proper administration of the school system," *Smith v. Darby,* supra at 313 (emphasis added), includes the right to demote. Of course, while the causes of demotion of a professional employee are not made express under any concept of tenure in the Code, these causes are not limitless. If it appears that action of a board "is based on a misconception of law, ignorance through lack of inquiry into facts necessary to form intelligent judgment, or the result of arbitrary will or caprice, courts will intervene to prevent an abuse of power." *Smith v. Darby,* supra at 315. There was no such abuse of power in Appellant's

case, where the record supports the Board's finding that he demonstrated a persistent attitude of unaccountability to his superiors. It follows that his claim of vagueness must fail.

Appellant claims a denial of due process in that the Board of Directors failed to advise him that he could be demoted for incompetent, insubordinate, disruptive, or disloyal conduct as specified in the Statement of Charges and that the Board failed to give Appellant reasonable notice that his conduct was prohibited and might constitute grounds for demotion.

"[T]he basic principle of due process is that the law must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Tyson v. New York City Housing Authority,* 369 F. Supp. 513 (S.D.N.Y. 1974). Each time the Executive Director discussed with Appellant his failure to remedy a particular problem, Appellant was implicitly placed on notice that his performance was unsatisfactory. Moreover, the five periodic discussions, which the record disclosed Appellant had with the Executive Director over the period of a year, represented clear evaluations—both formal and informal—by the Executive Director of Appellants unsatisfactory performance. These meetings culminated in a lengthy discussion in February, 1975 during which the Executive Director discussed with Appellant fifteen to twenty different areas of concern, many of which are reflected in the record as having been discussed with appellant prior to that meeting. Notice was provided the Appellant, both through his own basic knowledge of what constitutes professional propriety and responsibility and his continued contacts with the Executive Director. Even Appellant's

characterization of these sessions as "browbeatings", though not supported in the record, suggests that only obliviousness or disregard could have shielded Appellant from a sense of the seriousness of the Executive Director's dissatisfaction with his performance. In addition, a reading of both Section 1121 of the School Code and the responsibilities and duties set forth in his job description would have placed Appellant on notice that he could be demoted from the actions with which he was eventually charged.

The two federal cases cited by Appellant, *Sterzing v. Ft. Bend Independent School District,* 376 F. Supp. 657 (D. Tex. 1972) and *Webb v. Lake Mills Community School District,* 344 F. Supp. 791 (D. Iowa 1972) are inapposite since they deal with dismissal. We are dealing in the instant case with a reassignment involving no decrease in pay, where the Board's ambit of discretion is undoubtedly greater than in a dismissal action.

In terms of notice, as long as a board has set forth the requirements and responsibilities of a particular position, as in the Board's job description for Director of Special Education, and as long as the board has employed a responsible executive director to interpret and direct the needs of the district, and the performance of his subordinates, as is the case here, there is no statutory or general administrative requirement that a board separately promulgate an exhaustive list of standards of demotable conduct. We also find that when the four general charges of disloyalty, insubordination disruption, and incompetence were leveled against Appellant, they were given the muscle and flesh of thirty-seven individually detailed charges, thereby nullifying Appellant's contention that the general charges were impermissibly vague.

Given Appellant's contacts with the Executive Director, the terms of his contract and job description, his own supposed administrative awareness, and the statutorily provided for discretion in establishing causes for demotion, we conclude that Appellant was provided adequate notice of the potential outcome of his actions, and therefore suffered no deprivation of due process.

Appellant asserts that the requirements for the position of Director of Special Education as stated in the Preamble of the Statement of Charges are not contained in the job description for that position or in any rules, regulations, or written actions promulgated by the Board. We disagree.

The Preamble sets forth five requirements for the position of Director of Special Education which Appellant allegedly fell short of fulfilling. All four grounds and each of the thirty-seven individual charges were offered as specific violations of one or more of these five requirements. (See Statement of facts.) We find nothing unconstitutional, illegal, or invalid about these requirements as Appellant maintains. Nor can we agree that in the rapidly growing Lincoln Intermediate Unit there is anything overly ambiguous or unfairly subjective about organizational ability, ability to work with and motivate others, problem recognition and resolution in a positive climate, responsiveness to the needs of all the Unit, and accountability. These are general requirements, and they are stated generally.

Appellant has not advanced any valid arguments as to why the requirements for the position of Director of Special Education as stated in the Preamble must be contained in the job description or anywhere else. Regardless, a review

of the Job Description for Directors of Special Education as well as the five requirements stated in the Preamble to the Charges reveals that the substance of each of the five requirements has been set forth in the sixteen responsibilities and duties specified in the Job Description.

As a separate due process claim, Appellant asserts that the thirty-seven individual charges were continuously supplemented during the course of the hearing by twenty-nine new and unrelated charges of misconduct falling outside the Statement of Charges. Our review of the record reveals no denial of due process. "[N]otice to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged conduct with particularity." *In re Gault*, 387 U.S. 1, 33 (1967). Appellant was provided in advance a detailed Statement of Charges. The charges represented the basis for four months of hearings and a voluminous record. Extraneous matter was bound to intrude, although the Intermediate Unit Board Solicitor exerted a diligent effort to exclude improper evidence. This intrusion of extraneous matter does not violate due process:

> "The mere admission of matter which would be deemed incompetent in judicial proceedings will not invalidate the administrative order and will not constitute ground for reversal where it is merely cumulative or it is not shown that the administrative agency relied upon such evidence." Am Jur 2d, Administrative Law, 378.

The twenty-nine additional points are not new allegations. Some represent issues of credibility that emerged from proper cross-examination while others are undenied

statements of fact. Appellant objected to only some of the questions or responses, and he did not request additional time to meet these issues. It is important to recognize that "[t]he central feature of a trial is not affirmative presentation of evidence by each side; it is the opportunity for each side to attack the evidence presented by the other side." Davis, *Administrative Law and Government*, p. 192 (1975). In this case, Appellant had adequate opportunity to respond to the allegations against him. Moreover, a period of four months and twenty-six hearing dates elapsed before all testimony had been taken, ample time for Appellant to respond to items in the record which he construed to be new allegations.

Our review of the record leads us to conclude that the decision of the Board was based exclusively on the testimony relating to the Statement of Charges, notice of which was provided Appellant, that votes were taken on each of the thirty-seven individual charges, and that Appellant was not demoted by reason of any newly raised, extraneous allegations.

Appellant contends that a rating of his services is a necessary pre-condition to a demotion proceeding. Section 1123 of the School Code states in relevant part:

> "In determining whether a professional employe shall be dismissed for incompetence, and in rating the services of a temporary professional employe, the professional employe or temporary professional employe shall be rated by an approved rating system. . . ." 24 P.S. Section 11-1123.

This Office would be legislating if it concludes that rating is a condition precedent to a demotion under Section

1151. Even if it were to be found that a rating must precede a demotion for incompetency, a conclusion we do not draw, its omission would not reverse Appellant's demotion for insubordination, disloyalty, or disruption.

This Office also finds baseless the charge that the Executive Director lacked valid criteria and standards upon which to evaluate the performance of Appellant and to make observations of administrative effectiveness upon which to recommend Appellant's demotion. The Executive Director's educational background and work experience are in the record. He has a doctorate in school administration, served as a school administrator for eight years, as a school district superintendent for ten years, and became Executive Director of the Lincoln Intermediate Unit in February, 1974, serving in that capacity for more than a year when these charges were brought against Appellant. The standards he used in evaluating Appellant are found in the Preamble to the Statement of Charges. The Board, acting as fact-finder, spent many hours observing the Executive Director testify to the facts and to his own evaluative criteria under extensive direct and cross-examination and rebuttal questioning. The record provides ample opportunity to assess the skills, motives, and credibility of the chief administrative officer who brought these charges against Appellant on behalf of the Board. Moreover, Section 1123 of the School Code presupposes that every chief administrative officer of a school district or intermediate unit possesses evaluative skills since it places upon that individual the responsibility for rating personnel. The Board did not act arbitrarily or capriciously by ratifying through its demotion vote the standards of evaluation adopted by the Executive Director.

Appellant further argues that the four general charges of disloyalty, insubordination, disruption of staff, and incompetence in administration brought against him are not valid causes for termination of a contract or the demotion of a professional employe under Section 1122 of the Public School Code. The thrust of Appellant's argument is that Section 1122 lists the only valid causes for termination of a contract:

> "The only valid causes for termination of a contract . . . with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement [and] . . . persistent and willful violation of the school laws of this Commonwealth on the part of the professional employe." 24 P.S. Section 11-1122.

When Section 1151 requires that a demotion be conducted "in the same manner" as a dismissal of a professional employe, the causes for demotion are not limited to the causes for termination delineated in Section 1122. The legislature did not distinguish between demotions for reasons of administrative reorganization on the one hand and demotions for disciplinary reasons on the other hand, with the latter limited to Section 1122 causes for dismissal. Appellant's argument finds no support in the statute. The court spoke clearly and forcefully on this point in *Smith v. Darby School District*, supra:

> "A comparison of statutory provisions covering the dismissal of a professional employe with the provision covering the demotion of such employe indicates that the former set forth the reason for which an employe may be dismissed and the procedure to be followed, whereas the latter merely provides the pro-

cedure to be followed. The statute provides 'why' and 'how' an employe may be dismissed but only 'how' an employe may be demoted. Any professional employe may be demoted under the statute provided that such demotion takes place only after a hearing and that such demotion not be made in an arbitrary or discriminatory manner." *Smith v. Darby,* supra at 308.

The only protection against demotion which the legislature chose to grant to professional employes is procedural protection against arbitrary or discriminatory demotion, clearly not violated in Appellant's case. *Smith v. Darby* stands as judicial reaffirmation of the critical concept that the legislature has conferred upon school boards the discretion and authority to change administrative staffing for purposes of efficiency, economy, improving personnel, or any other legitimate purpose. Unlike dismissal, the legislature has not limited the grounds for demotion as long as it is not effectuated arbitrarily or capriciously.

Appellant contends that the Board of Directors failed to render a fair and impartial decision because it decided before the hearing was held that it had sufficient evidence to support its action and it thereby demoted Appellant effective May 7, 1975. A demotion cannot become effective until after a hearing has occurred. *Tassone v. School District of Redstone Township,* 408 Pa. 290, 183 A.2d 536 (1962). That is the case here, where the Board conscientiously followed the procedural steps set forth in *Abington School Board v. Pittenger,* 9 Pa. Commonwealth Ct. 62, 305 A.2d 382 (1973).

"The Board only needed to have passed a resolution that it had sufficient evidence to support its belief, to demote Albrecht by some given date, and therein

direct the Secretary and President of the Board to serve notice upon Albrecht of this fact and to advise him of his right to a hearing. At this point, Albrecht would have had a decision to make; whether to request the hearing or consent to the demotion." *Abington v. Pittenger,* supra at 71.

The Board was open and impartial in its attentiveness to testimony and in its final deliberation. On page four of the more than thirty-five hundred pages of testimony the Board President, with characteristic fairness, referred to the "pending demotion". After the hearing began the Board continued the effective date of the demotion from May 7, 1975 to June 30, 1975 and finally to August 5, 1975, not wanting to render a final decision until the hearing had concluded. Moreover, the final voting patterns of the Board members indicate an independence of judgment. Only one member voted consistently, to dismiss the charges. Every other Board member voted to sustain some charges and to dismiss others.

There is a presumption of honesty and integrity of those serving as adjudicators. *Winthrow v. Larkin,* 95 Sup. Ct. 1456, 1464 (1975). The Court in *Winthrow,* stated, "The mere fact that a tribunal has taken a public position on the facts is not enough to place that tribunal under a Constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required."

The record does not reflect that the Board acted blindly or unfairly, nor that it was bound by any arbitrary prejudgment. The decision of the Board to sustain the charges represents a proper and reasonable exercise of discretion on the merits of the action.

While it lacks the finality and the serious implications for future employment of a dismissal, a demotion undoubtedly affects the rights of a professional employe. The function of the hearing, the burden of proof, and the criteria for the Board's decision are carefully set forth in the *Appeal of Kauffman,* Teacher Tenure Appeal No. 228, Opinion by the Secretary of Education, October 15, 1974:

> "The prime function of the hearing procedure is to require the official authority to explain its action to the professional employe affected and to afford him the opportunity to present his position in light of such explanation, Tassone, supra. If the school board's action is a demotion, the board has the duty to make clear and apparent the reason for the demotion, Smith v. Darby, supra; Tassone, supra. After the explanation for the demotion is given, the burden is on the professional employe to prove the impropriety of the board's action, Smith v. Darby, supra.
>
> . . . .
>
> Accordingly, we will not reverse a school board's action . . . where the school board has fully explained at the hearing how its action affects the professional employe and has given proper reasons for that action; reasons which the employe claiming a demotion has failed to discredit or rebut. This policy is subject to the following conditions:
>
> 1. The professional employe claiming a demotion must be allowed prior to the hearing the opportunity to learn the reasons for the board's action so that he can prepare to rebut those reasons at the hearing.

> 2. It is to be understood that a nonconsensual demotion cannot become effective until after the hearing. In our opinion, the hearing is concluded when the board renders its decision. Any salary or benefits lost by the employe prior to that decision will be restored to him." *Appeal of Kauffman,* supra at 9, 10.

The guiding decision on the subject of demotions is *Smith v. Darby,* cited throughout this opinion. The record reflects the Lincoln Intermediate Board's compliance with the two conditions set forth in that case: That a hearing must precede a demotion and that the demotion must not be arbitrary or discriminatory.

We do not agree with the Appellant's argument that the burden of proof is just as heavy on the Board in this demotion proceeding as it would be with a dismissal. Appellant contends that the charges and the grounds were not proven by a preponderance of the evidence. The Solicitor for the Board instructed its members that the charges for demotion must be proved by a preponderance of the evidence. The *Appeal of Kauffman,* supra, and the cases cited therein indicate that burden of proof suggested by the Solicitor may well have been a harsher burden for the Board than is required. The present state of the law as to the burden of proof in a Section 1151 demotion proceeding is as follows:

1. The Board has the duty to make clear and apparent the reason for the demotion.

2. After the explanation by the Board is given, the burden is on the professional employe to prove the impropriety of the Board's action.

On appeal, the question is whether a board acted in a proper manner. The *Appeal of Kauffman,* supra, sets forth the criteria as being:

1. Whether the procedures required by the School Code for demotions have been followed.

2. Whether the board's action resulted from arbitrary or discriminatory reasons.

Our review is limited to determining whether or not there is substantial evidence on the record to support the Board's judgment. See *Landi v. West Chester Area School District,* Pa. Cwmlth. Ct. 353 A.2d 895 (1976); *Caffas v. Bd. of School Directors of Upper Dauphin Area,* Pa. Cmwlth. Ct. 353 A.2d 898 (1976). Since the Board, as triers of fact, heard all the testimony of the witnesses and had an opportunity to observe their demeanor and to judge their credibility, the Board must be given the benefit of the doubt as to the fairness and impartiality with which it weighed the evidence before it.

A thorough review of the record indicates that the statutory procedures for demotions as interpreted in *Abington v. Pittenger,* supra, have been scrupulously followed. The Secretary concludes that there is substantial evidence on the record to support the decision of the Board of Directors of the Lincoln Intermediate Unit to demote Appellant as a reasonable exercise of discretion free from any arbitrary or discriminatory reasons and free from any violation of due process.

ORDER

AND NOW, this 2nd day of February, 1977 it is ordered and decreed that the Appeal of Harold D. McCoy from the decision of the Board of School Directors of the Lincoln Intermediate Unit No. 12 be and is hereby dismissed.

Supreme Court, U. S.
FILED
APR 3 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978

No. 78-1361

HAROLD D. McCOY,

Petitioner

vs.

BOARD OF DIRECTORS OF LINCOLN INTERMEDIATE UNIT NO. 12,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Was petitioner deprived of a constitutionally protected property interest so as to give rise to a claim of denial of due process?

II. Assuming, arguendo, that petitioner has been deprived of some property interest, was he denied due process merely because the board determined, prior to an adversary hearing, that there was sufficient evidence to warrant a demotion, where a full adversary hearing was held prior to the effective date of the demotion?

III. Assuming, arguendo, that petitioner was deprived of some property interest, was he denied due process simply because the statute under which he was demoted failed to specifically enumerate the types of conduct which subject one to such action?

ARGUMENT

I. Petitioner Was Not Deprived of any Constitutionally Protected Property Interest and Thus Has No Claim as to Which Procedural Due Process Applies

Petitioner correctly points out to the Court that, as a tenured professional employee, he had an "expectation of continuing employment which established a property right" from which grew certain procedural due process rights (Petition at p. 11). What Petitioner fails to point out is the fact that *he has never been deprived of this expectation.* To the contrary, Petitioner remains to this very day an employee of the Respondent, albeit in a different capacity than he would like.

It is well established that procedural due process applies only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property and that the range of such interests is not infinite. *Board of Regents v. Roth,* 408 U.S. 564, 569-70 (1972). In the context of public employment, such protected property interests are created by legislation or contract, or by the employer's actions and course of conduct, as with the de facto tenure system in *Perry v. Sinderman,* 408 U.S. 593 (1972). Throughout the long and arduous proceedings in this case, Petitioner has persistently refused to identify either the nature or the source of the property right which he alleges has been denied.

While the tenure provisions of the Pennsylvania Public School Code, 24 Pa. Stat. Ann. §11-1122, do establish a property right in continued employment generally, they establish no such right with respect to any particular position:

> "The tenure provisions of the School Code do not infringe upon the general power of a school board to assign professional employees to particular classes or particular schools or positions in accordance with its judgment and discretion reasonably exercised. A professional employee, under the tenure provisions of the Code, does not acquire a vested right to teach in any certain class or in any certain school. . . ." *Smith v. Darby School District,* 388 Pa. 301, 306, 130 A.2d 661, 664-65 (1957).

This interpretation by Pennsylvania's highest Court is, of course, binding on this Court. *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482, 488 (1976).

Far from granting any substantive right in a particular position, the demotion section, 24 Pa. Stat. Ann. §11-1151, merely provides that there shall be no demotion

> ". . . '. . . without the consent of the employe, or, if such consent is not received, then *such demotion shall be subject to the right to a hearing* before the board of school directors and an appeal in the same manner as . . . in the case of the dismissal of a professional employee." (Emphasis added.)

Obviously, the statute is intended to provide only procedural protection with respect to demotions and has been so interpreted by the Pennsylvania Supreme Court. *Smith, supra,* at 308. The fact that the statute provides for an opportunity for hearing does not, of course, create a prop-

erty right. Such a blurring of the distinction between substantive and procedural due process was properly rejected by Circuit Judge (now U.S. Supreme Court Justice) Stevens in *Shirck v. Thomas,* 486 F.2d 691 (1973), where a non-tenured teacher argued that a requirement that she be given notice of the nonrenewal of her contract created a property interest.

Just as the respondent in *Board of Regents v. Roth, supra,* was found to have absolutely no claim of entitlement to re-employment following the termination of his one-year contract, so, the Petitioner here possessed absolutely no claim of entitlement to his particular position as Director of Special Education. This lack of any constitutionally protected property right is, of course, fatal to Petitioner's claim of denial of constitutional due process.

II. Assuming, Arguendo, That Petitioner Has Been Deprived of Some Property Interest, He Was Not Denied Due Process Merely Because the Board Determined, Prior to an Adversary Hearing, That There Was Sufficient Evidence To Warrant a Demotion, Where a Full Adversary Hearing Was Held Prior to the Effective Date of the Demotion

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Even if the Petitioner was deprived of some, as yet unarticulated property interest, Respondent submits that there was no denial of his due process rights. The statutory procedure set forth in the School Code and scrupulously followed in this case is more than sufficient to meet any constitutional due process requirements.

As Justice Rehnquist observed in *Arnett v. Kennedy,* 416 U.S. 134, at 155 (1974), "due process" is a flexible concept:

> "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.
>
> 'The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation.' *Cafeteria Workers v. McElroy,* 367 U.S. at 895, 6 L.Ed. 2d 1230."

In determining the nature and amount of "due process" which is required in a particular factual context, this Court has generally attempted to balance the competing interests. *See, e.g., Hortonville Joint School District, supra,* at 494.

On the scale of all possible deprivations, surely the demotion of a public employee from one position to another with no reduction in pay must rank among the most modest of actions, requiring the absolute minimum of due process. Nevertheless, the Petitioner in this case, after being warned repeatedly over a period of nearly one year that his performance was unsatisfactory, was presented with a detailed statement of charges and given a full and formal hearing. Petitioner had, and took, ample opportunity to confront and cross-examine adverse witnesses and to present testimony and witnesses on his own behalf. The Board met twenty-six times and compiled a record of some 3,543 pages. Since the Board's decision, Petitioner has fully exercised his rights of appeal. In sum,

Petitioner has had every opportunity to defend himself and his rights—the very essence of due process.

Faced with this overwhelming deluge of procedural safeguards, Petitioner has retreated to the last and common refuge of disappointed litigants; that is, the claim that the adjudicatory body was somehow "biased" against him, thus depriving him of due process. The alleged basis for this claim is the fact that, prior to the adversary hearing, the Respondent Board determined that there was sufficient evidence to warrant a demotion. Thereafter, the Board so notified the Petitioner and advised him of his right to a hearing. This is precisely the procedure mandated by the School Code and approved by the Pennsylvania Courts:

> ". . . The Board only needed to have passed a resolution that it had sufficient evidence to support its belief, to demote [the appellant] Albrecht by some given date, and therein direct the Secretary and President of the Board to serve notice upon Albrecht of this fact and to advise him of his right to a hearing. . . ." *Abington School Board v. Pittenger,* 9 Pa. Commonwealth Ct. 62, 71, 305 A.2d 382, 387 (1973).

While conceding that *Withrow v. Larkin,* 421 U.S. 35 (1975), would control if the Board had couched its prior determination in terms of "probable cause" (Petition at p. 12), Petitioner never explains why the Board's action here was substantively any different. In fact, the Board's determination amounted to no more than a statement that, absent Petitioner's exercise of his right to a hearing and his presentation of testimony to rebut the charges against him, those charges were sufficient to warrant his demotion. Counsel for Petitioner made this very point in his closing argument to the Board:

> "When the charges were initially presented to you as the Board of Directors, you were not required to hear both sides. All you had to do was to determine whether if everything stated in the Charges was true, the Charges would constitute valid grounds for the recommended action of demotion. Your vote on the initial charges should not make you feel committed to sustaining them now simply to be consistent. This would be a gross miscarriage of justice. Now you have heard both the evidence offered to support the Charges and the evidence presented in defense against the Charges. Your duty is now to reach a decision which is fair, equitable, unbiased and just." (Closing Argument of John D. Killian, Esquire, on behalf of Petitioner, N.T. 3346-3347.)

Moreover, while baldly asserting the "irremedial bias" of the Board (Petition at p. 13), Petitioner, like the appellee in *Withrow, supra,* has presented no evidence to indicate that the impartiality of the Board was actually compromised. This omission is significant in view of the clear and well established presumption of honesty and integrity on the part of those with decision-making power. *Hortonville Joint School District, supra,* at 497. It is also interesting to note that every Board member voted to sustain some charges and dismiss others with the exception of one member who voted to dismiss each and every charge.

Further, while *Withrow* was specifically concerned with possible bias resulting from the combination of investigatory and adjudicatory functions, the holding in that case provides the precise answer to Petitioner's argument:

"The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." 421 U.S. at 55.

Finally, *Hortonville Joint School District, supra,* is instructive. There, school teachers terminated for engaging in an illegal strike argued that the school board was biased because of its involvement in the negotiations that preceded and precipitated the striking teachers' discharge. This Court rejected that contention:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. [Citations omitted]. Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States v. Morgan,* 313 U.S. 409, 421 (1941)." *Hortonville Joint School District, supra,* at 493.

The Court further distinguished *Morrissey v. Brewer,* 408 U.S. 471 (1972), cited by Petitioner, as inapplicable to this factual context. See 426 U.S. at 491.

Petitioner has shown nothing to support his bare allegation of the bias and has certainly not overcome the presumption of fairness on the part of the Board. This Court has recently dealt very comprehensively with the bias issue in both *Withrow, supra,* and *Hortonville Joint School District, supra,* and those cases are controlling here.

III. Assuming, Arguendo, That Petitioner Has Been Deprived of Some Property Interest, He Was Not Denied Due Process Simply Because the Statute Under Which He Was Demoted Failed To Specifically Enumerate the Types of Conduct Which Subject One to Such Action

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While Respondent agrees with Petitioner that the statute in question does not specifically enumerate the causes for demotion, it denies that such specific enumeration is either logical or constitutionally required. To the contrary, the Legislature, while so enumerating the causes for termination, specifically intended to allow school boards to exercise wide discretion with respect to employee reassignments and demotions.

> "School authorities must be given broad discretionary powers to ensure a better education for the children of this Commonwealth and any restrictions on the exercise of these powers must be strictly construed on the basis that the public interest predominates and private interests are subordinate thereto. (Citations omitted)." *Smith, supra,* 388 Pa. at 314, 130 A.2d at 668-69.

Moreover, a party whose conduct is so obviously and flagrantly contrary to standards of propriety that any reasonable man would have known or should have known that he was crossing the boundary into prohibitive conduct, may not raise the issue of unconstitutional vagueness. *Herzbrun v. Milwaukee County,* 504 F.2d 1189 (7th Cir. 1974); *Michini v. Rizzo,* 379 F. Supp. 837 (E.D. Pa. 1974). This is particularly so where, as here, there is no

assertion that Petitioner's constitutional rights of speech or assembly have been infringed so as to "chill" the exercise of these rights. *Herzbrun, supra.* It is simply incomprehensible that a man of this Petitioner's intelligence and background could not realize that his insubordinate and disruptive conduct could lead to administrative action by his superiors.

Even if Petitioner has standing to raise the vagueness issue, it is clear that the statute, as interpreted by the Pennsylvania courts, withstands constitutional scrutiny. There is, of course, a strong presumption in favor of the constitutionality of statutes. *Williams v. Samuel,* 332 Pa. 265, 273 (1938). Further, even though the bare statutory language may be vague or uncertain, narrowing construction by state appellate courts may cure any unconstitutional vagueness. *Minnesota ex rel. Pearson v. Probate Court of Ramsey County,* 309 U.S. 270 (1948). For instance, while making it clear that school boards may demote professional employees for any number of reasons, the Pennsylvania Supreme Court in *Smith, supra,* also noted that no such demotion could be made in an arbitrary or discriminatory manner. *Smith, supra,* at 308, 130 A.2d at 666. Further, the Court in *Smith* noted:

> "Time and again our courts have stated that the purpose of the tenure provisions of the School Code is the maintenance of 'an adequate and competent teaching staff, free from political and personal arbitrary interference, whereby capable and competent teachers might feel secure and more efficiently perform their duty of instruction.' (Citations omitted.)" 388 Pa. at 311-312, 130 A.2d at 667-68.

Petitioner assails this use of the "adequate and competent" standard as not applicable to his demotion and as an extension of *Arnett v. Kennedy,* 416 U.S. 134 (1974). Neither contention has merit. While accurately pointing out that the Court in *Smith, supra,* limited the Board's discretion by stating that it must act "intelligently, impartially and with sound discretion" (Petition at p. 15). Petitioner has shown nothing to take the Board's action in this case outside those restrictions. Petitioner also argues that this standard should not be applied to "subjective matters such as insubordination and disloyalty" (Petition at page 17). Since such insubordination and disloyalty obviously interfere with the efficiency of the school system, there is absolutely no reason why such a standard should not apply. Further, in view of the voluminous testimony supporting the findings in this case, it must be said that the "subjectiveness" of Petitioner's conduct exists in his eyes alone.

Finally, Petitioner has totally failed to distinguish *Arnett, supra.* In that case, this Court upheld that provision of the Lloyd-LaFollette Act authorizing the *discharge* of an employee for "such cause as will promote the efficiency of the Service," against an attack based on unconstitutional vagueness and overbreadth. In view of the infinite variety of factual situations which could justify dismissal, the Court found that this adequately described the grounds.

As Justice Rehnquist noted in *Arnett,* supra, at 159, *citing Colton v. Kentucky,* 407 U.S. 104, 110 (1972):

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principal designed to convert into a constitutional dilemma the practical

> difficulties in drawing [criminal] statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

Of particular relevance to this case is the following, also quoted with approval in *Arnett,supra,* at 161:

> " 'We think it is inherent in the employment relationship as a matter of common sense if not common law that an employee in appellant's circumstances cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory lampoons. We believe that Meehan cannot fairly claim that discharge following an attack like that presented by this record comes as an unfair surprise or is so unexpected and uncertain a to chill his freedom to engage in appropriate speech.' *Meehan v. Macy,* 392 F.2d 822, 835 (1968), modified 425 F.2d 469, aff'd en banc 425 F.2d 472 (1969)."

The Legislature of Pennsylvania did not intend, nor does the United States Constitution require, that a school board be powerless to put its own house in order and to take such reasonable measures as it deems appropriate to insure that its policies will be followed and its instructions carried out, even if reassignment or demotion of personnel is required. The Petitioner in this case clearly knew that his conduct was unacceptable and made a conscious and deliberate decision to continue such conduct in the face of repeated warnings. Even if Petitioner has standing to raise the vagueness issue at all, it is clearly controlled by *Arnett v. Kennedy, supra.*

CONCLUSION

Since Petitioner had no property interest in his position as Director of Special Education, his demotion from that position raises no issue of constitutional due process. Even if some property interest was deprived, Petitioner was extended the full panoply of due process rights. Petitioner has shown nothing to substantiate his claim of bias on the part of the Board or to overcome the presumed constitutionality of the statute involved. Moreover, this Court has rendered a number of recent and comprehensive decisions in this area, including *Hortonville Joint School District, supra; Withrow v. Larkin, supra;* and *Arnett v. Kennedy, supra.* Petitioner has raised no Federal question of substance not heretofore determined nor has he advanced any other "special and important reasons" why this petition should be granted. See, *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955).

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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